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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

SYLVESTER BROOKS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT
OF CRIMINAL APPEALS OF ALABAMA

PETITION OF THE STATE OF ALABAMA

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III*
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

*Counsel of Record

QUESTIONS PRESENTED

A. Where a warrant magistrate finds probable cause to believe that persons present at a criminal operation are in possession of evidence, contraband or weapons, does the Fourth Amendment forbid the issuance of a search warrant for such persons, where they cannot be identified at the time the warrant is issued?

B. Did this Honorable Court in Ybarra v. Illinois, (444 U.S. 85, 62 L.Ed.2d 238, 100 S.Ct. 338 [1979]), adopt a per se rule forbidding the issuance of search warrants for persons who cannot be identified or described, except by their presence in a defined building?

THE PARTIES

In the Circuit Court of Lee County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were Sylvester Brooks who is Respondent herein, as Defendant, Appellant and Respondent, respectively, and the State of Alabama, who is Petitioner herein, as Plaintiff, Appellee, and Petitioner, respectively.

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TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

PETITION OF THE STATE OF ALABAMA

The State of Alabama, Your Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and orders of the Supreme Court and Court of Criminal Appeals of Alabama in the above cause.

OPINIONS AND ORDERS BELOW

The Order of the Circuit Court of Lee County, Alabama, overruling the Respondent's motion to suppress is not reported and is

submitted as Appendix "A" to this petition.

The opinion and order of the Court of Criminal Appeals of Alabama reversing the Respondent's conviction is reported as follows:

Brooks v. State, 593 So.2d 97

(Ala. Cr. App, 1991)

A copy of the same is submitted in Appendix "B" hereto.

The order of the Court of Criminal Appeals of Alabama denying rehearing is reported as part of the report of the Court's opinion, as set out above.

A copy of the same is submitted in Appendix "B" hereto.

The order of the Supreme Court of Alabama denying certiorari review is reported as part of the report of the Court of Criminal Appeals' opinion.

A copy of the same is submitted as Appendix "C" hereto.

JURISDICTION

The order of the Supreme Court of Alabama denying review was issued on February 7, 1992, and this petition is filed within ninety (90) days of said date. This Honorable Court's Jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Supreme Court and Court of Criminal Appeals of Alabama, believed that their decisions were mandated by the Fourth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Your Petitioner is making a claim under the same said provisions. Said constitutional provisions read:

"AMENDMENT IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"AMENDMENT XIV

"Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

No statutory provisions are at issue in this proceeding. The Respondent was indicted and convicted under Section 13A-12-231,(2)(a) Code of Alabama, 1975, and the warrant was issued pursuant to Sections 15-5-1-5 of the same Code. Copies of these

statutes are submitted in Appendix "D" hereto.

STATEMENT OF THE CASE

In this case the Court of Criminal Appeals of Alabama ruled that a warrant magistrate could not, under the United States Constitution as interpreted by this Honorable Court in Ybarra v. Illinois (444 U.S. 85, 62 L.Ed.2d 238, 100 S. Ct. 338 [1979]), issue a search warrant commanding the search of persons present at a criminal operation, where such persons cannot be otherwise described. In reaching this conclusion, the Court of Criminal Appeals followed, quoted from and extended its decision in Helms v. State (549 So. 2d 598 [Ala.Cr.App, 1989]; cert. den; U.S. cert. den. 493 U.S. 1022, 107 L.Ed.2d 744, 110 S. Ct. 725 [1990])

In Helms a magistrate issued a search warrant for a certain apartment, "...and the persons, if you find the same present...."

(Helms 548 So. 2d 598, 600) Although the apartment was not rented by Helms, he was an occupant of the apartment and was present at the time of the search, and he was searched under the warrant. The Court of Criminal Appeals ruled that the warrant was valid as to the apartment (Helms 549 So. 2d 598, 599) but invalid as to Helms under Ybarra v. Illinois, above. The Court wrote:

> "...The search warrant issued in the instant case reads as follows:...
>
> "...'You are hereby commanded to search forthwith the residence above described for the property and the persons, if you find the same present...'...
>
> "As can be seen from the above, the search warrant contains no descriptions or names of any persons to be searched. The leading case on this issue is Ybarra v. Illinois, 444 U.S. 85, 100 S. Ct. 338, 62 L.Ed.2d 238 (1979). In Ybarra, the United States Supreme Court held that the Fourth and Fourteenth Amendments will not be construed to permit evidence searches of persons who, at the commencement of the search, are on 'compact' premises subject to a search

warrant, but are not named or described in the warrant, even where the police have a 'reasonable belief' that such persons 'are connected with' drug trafficking and 'may be concealing or carrying away the contraband.' 444 U.S. at 94, 100 S. Ct. at 344. This court, as well as all other courts in this land, is obliged to follow this decision.

"Alabama courts, in following the dictates of Ybarra, have held that a warrant to search designated premises will not authorize the search of every individual who happens to be on the premises...[citations and examples omitted]...

"The warrant issued in the instant case authorized the search of 'the residence above described for the property and the persons.' Based upon Ybarra and the aforementioned Alabama cases, the wording 'and the persons' contained in the warrant was too broad to justify the search of appellant's person since no persons were named or described in the warrant...." (549 So.2d 598, 600-601; emphasis supplied)

And:

"...Because of the controlling authority of the United States Supreme Court case of Ybarra v. Illinois, supra, we reluctantly

> hold that the strip search of appellant was not justified under the search warrant as written, or pursuant to any of the exceptions to the warrant requirement. Accordingly, the cocaine taken from him was due to be suppressed...." (Helms 549 So.2d 598, 601; emphasis supplied)

In the instant case, the Respondent, Sylvester Brooks was indicted for trafficking in cocaine.[1], (R.pp 603-604)

Prior to trial, the Appellant moved to suppress the evidence found on his person pursuant to a search warrant. (R.P. 612) Evidence on the same was heard before trial (R.pp. 4-269), and the motion was overruled by an order which read:

> "...[T]he Court finds that the search in this case was not unreasonable. Neither were the seizures. That the warrant in this case was issued on probable cause, that it was supported by oath or affirmation, and it particularly described the place to be searched and the persons or things to be seized.

---

1. Section 13A-12-231(2) Code of Alabama, 1975; appendix D.

"And, therefore, the order and judgment of the Court that the warrant in this case, that is the search warrant, is proper, and I so find.

"I also find that the search itself and the matters seized were done pursuant to law and in accordance with the Constitution of the State of Alabama and of the Federal Constitution.

"Accordingly, your motions, each of the defendant's motions to suppress is denied. The results of the search, the Court finds, are admissible."(R. pp. 267-268; Appendix "A")

After a mistrial (R.pp 599-600) the cause came on for trial on May 24, 1989. The Respondent was convicted and sentenced to life imprisonment and a $50,000.00 fine, as authorized by Section 13A-12-231(2)(a), Code of Alabama, 1975; Appendix D. (R.p. 1, 600-601)

Appeal followed.

On July 27, 1991, the Court of Criminal Appeals of Alabama reversed the Respondent's conviction. Brooks v. State

593 So.2d 97 (Ala. Cr. App, 1991); appendix "B"). As far as is relevant to the issue raised by this petition, the Court ruled that the warrant was valid as to the place and one person who could be identified and who was named in the warrant. Brooks, note 1, 593 So.2d 97, 98; Appendix "B", page 4) The Court stated and relied on the fact that the affiant,"...officer acknowledged at the suppression hearing that, when obtaining the warrant, he had no knowledge that anyone else was expected to be in the restaurant and that he did not know that the ...[Respondent] would be present...." Brooks 593 So.2d 97, 98; Appendix "B", page 8) The Court then went on to hold that the warrant was void as to the Respondent, because he was not and could not have been, named or particularly described in the warrant. In reaching this conclusion, the Court of Appeals relied on Helms v. State, above, and quoted much of

the language from Helms, which we set out at pages 6-8 above, including the language: "...[T]he leading case on this issue is Ybarra v. Illinois...." and "...Alabama Courts, in following the dictates of Ybarra...." (Brooks 593 So.2d 97, 99; Appendix "B", pages 8-10) The Court of Appeals even concluded that the warrant in this case was so bad as to the Respondent that the executing officers' reliance on it in good faith could not protect the evidence from exclusion.[2]

Your Petitioner applied for rehearing arguing, as it had on original submission:

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2. See United States v. Leon 468 U.S. 897, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984); Massachusetts v. Sheppard 468 U.S. 981, 82 L.Ed.2d 737, 104 S.Ct. 3424 (1984) and Walker v. State 462 So.2d 794, 795 (Ala.Cr.App, 1984); cert. den, all cited by the State on original submission in the Court of Appeals.

1. A warrant directing the search of persons present at a criminal operation is valid.

2. The officers were justified in relying on the warrant in good faith.

3. Even if the warrant was void, the magistrate's finding of probable cause as to the place, coupled with what the officers found when they went to execute the warrant, justified the search of the Respondent.

On September 20, 1991,the application for rehearing was denied without opinion. (Appendix "B", pages 14-15)

Your Petitioner sought review in the Alabama Supreme Court raising the same issues which it had raised on original submission and on rehearing in the Court of Appeals. On February 7, 1992, the State's petition was denied. (Appendix "C")

The instant petition is filed in this Honorable Court raising only the first

issue raised in the state courts, the validity of a "persons present" warrant.

STATEMENT OF THE FACTS

The facts relating to the search of the Respondent's person and seizure of cocaine from him are as follows:

For about two weeks prior to October 7, 1988, Detective Melvin Harrison had kept John & Bo's Fish Supreme in Opelika, Alabama, under surveillance. This was a carry out restaurant type of establishment, with large areas of windows through which a number of individuals kept watch on the various approaches to the building. Sales were made through a service window; the building itself was not open to the public. (R. p. 66-72)

On October 7, 1988, Detective Harrison met with an undercover informant. The Detective searched the informer to be sure that he had no drugs or money on his

person. The informer, who was equipped with a body transmitter, then went to the service window of the establishment and purchased cocaine with marked money. Detective Harrison was able to hear and see the transaction through the transmitter and a telescope. Harrison was also able to observe and monitor another cocaine sale which was made contemporaneously with but independently of the controlled buy. (R. pp. 73-75 and 130-131)

Detective Harrison then executed a search warrant affidavit, which read:

> "[I]n Lee County, State of Alabama there is now being concealed certain property, namely cocaine hydrochloride, a Schedule II drug under the Alabama Uniform Controlled Substances Act, and United States Currency which are now being stored, concealed, otherwise hidden at 600 South Fourth Street Opelika, Alabama, presently known as JOHN & BO's FISH SUPREME.
>
> "(here give alleged grounds for search and seizure)

"And that the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows: a confidential informant in the past forty eight hours has purchased cocaine from a black male known as Mike Perry at JOHN & BO's FISH SUPREME, 600 South Fourth Street in Opelika, Alabama. The money used in the purchase was copied and the serial numbers recorded. The purchase was also monitored and observed by Det. Harrison. The confidential informant used has been proven to be reliable and in the past has aided in the arrest of several persons. JOHN & BO's FISH SUPREME business license is also under the name of Michael Perry. Det. Harrison checked with the Opelika Light and Power and found that the power at JOHN AND BO's FISH SUPREME is issued to Michael Perry. ..."(R. p. 644)

The affidavit was presented to a judge of the District Court of Lee County. The District Judge placed the Detective under oath and examined him about the matters set out in the affidavit. Detective Harrison also advised the District Judge of the cocaine purchase which had occurred at the

time of but independently of the controlled buy. (R. p. 130-133)

The District Judge issued the warrant, which read:

"SEARCH WARRANT

"The State of Alabama, County of Lee, City of Opelika

"To any Sheriff, Deputy and/or Municipal Police:

"Proof by affidavit having been made this day before me, by Detective Melvin Harrison of the Opelika Police Department. You are hereby commanded to make immediate search on the person and premises of Michael Perry, alias, and the business at 600 South Fourth Street Opelika, Alabama known as JOHN AND BO's FISH SUPREME, and any other persons therein, and any vehicles on the premise for the following property [:] cocaine hydrochloride or any other controlled substance and United States Currency and if you find the same or any part thereof, to bring it forthwith before me, at my office at Opelika, Lee County, Alabama.

"Dated the 7 day of October 1988. (R.pp. 51-61, 129-132 and 646; emphasis supplied.)

Since Detective Harrison had observed persons inside the establishment keeping

watch, the building was not open to the public and was secured with steel doors and locks, and Harrison had received information that any appearance of the police would result in the drugs being destroyed, he enlisted the aide of the Opelika Fire Department in gaining entry. (R. pp. 66-72 and 127-129)

Inspector Meadows of the Opelika Fire Department was admitted to the locked building to inspect the sprinkler system. He opened the door, whereupon, the officers with the warrant announced their purpose and authority and entered the building. (R. pp. 69-70)

The Respondent was found inside the establishment and cocaine and marked money were found on the Respondent's person. (R. pp. 65 and 111-112)

SUMMARY OF THE ARGUMENT

There was in this case clear probable cause to search those present, and the Alabama appellate courts recognized this as to a person whose identity was known at the time the warrant was issued. Unless the Alabama courts are correct in ruling that this Court in Ybarra v. Illinois, (444 U.S.85, 62 L.Ed.2d 238, 100 S. Ct. 338 [1979]), established a per se rule barring the issuance of warrants to search persons who can be identified only by their presence at a criminal operation, then there is no basis in law for the decision of the state appellate courts in this case.

A. This case presents an important question not previously addressed by this Honorable Court. This Court in Ybarra, above, stated that it did not need to consider this question. Ybarra v. Illinois, note 4, 444 U.S. 85, 92, 62

L.Ed.2d 238, 246. This case clearly presents the question.

B. The appellate courts of Colorado, Florida, Massachusetts, Minnesota, New Jersey, Oregon and Wisconsin have, since the decision in Ybarra, resolved the issue of this case in conflict with the decision reached by the Alabama appellate courts. In addition, the Courts of Colorado, Minnesota and Wisconsin have expressly rejected arguments that Ybarra forbids warrants for persons present at criminal operations, who cannot otherwise be identified.

C. By placing unidentifiable persons, who are present at criminal operations which are ordered searched, beyond the warrant process, the Alabama appellate courts ruled contrary to the Fourth Amendment's policy which prefers searches pursuant to search warrants.

ARGUMENT

This case presents the common situation where an ongoing criminal enterprise is found occupying a building. It is undisputed in this case that the magistrate was authorized to order the search of the building. But, may the search of persons in the building be authorized? As the Supreme Court of South Carolina stated in State v. Ferrell (266 S.E. 2d 869, [S.C, 1980]):

> It is unreasonable to infer that anyone other than a participant would be present. In such a persuasive setting probable cause existed to search all present. U.S. v. Johnson, 475 F.2d 977, 980 (1973); State v. DeSimone, 60 N.J. 19, 288 A.2d 849 (1972)...." (266 S.E.2d 869, 872)

The Alabama appellate courts would agree, and they upheld the search of Michael Perry's person under the warrant, because Perry was named in the warrant and was

present in the building. However, because Detective Harrison could not predict, identify and name or describe others who would be present when the warrant was executed, the warrant was held to be void as to those described only as, "...other persons therein...." The issue is: Is such a description sufficient for the purposes of a search warrant?

The purpose of naming or describing the persons, places and things to be searched in a warrant is to insure that only those as to whom or which probable cause has been found are searched. Lo-Ji Sales Inc. v. New York 442 U.S. 319, 60 L.Ed.2d 920, 99 S.Ct. 2319 (1979). Obviously, officers executing this warrant would be able to ascertain who was intended by "...other persons therein...." See Steele v. United States 267 U.S. 498, 503, 69 L.Ed. 757, 760, 45 S.Ct. 414 (1925). The persons therein, i.e. inside the sealed

building out of which the criminal enterprise as being operated, were the very persons as to whom probable cause was found by the magistrate. Therefore, unless the Alabama appellate courts are correct in holding that this Honorable Court's decision in Ybarra v. Illinois, (444 U.S. 85, 62 L.Ed.2d 238, 100 S.Ct. 338 [1979]), established a per se rule forbidding magistrates to issue warrants for the search of unidentified persons present at a place ordered searched, the decision of these courts has no basis in law.

A.

REASON FOR GRANTING THE WRIT: AN IMPORTANT NOVEL QUESTION

In Ybarra v. Illinois, (444 U.S. 85, 62 L.Ed.2d 238, 100 S.Ct. 338 [1979]), this Court rejected a state statute, which allowed a "pat down" of all persons present at a place ordered searched by a search warrant, even if the place was open to the

public and there was no reason to suspect such persons of criminal activity. Ybarra, note 1, 444 U.S. 85, 87, 62 L.Ed.2d 238, 243. Compare Brown v. Texas 443 U.S. 47, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979). In Ybarra the warrant magistrate had ordered the search of a public tavern and a named bartender only; the warrant did not mention any other particular person or other persons generally. As this Court observed in Ybarra, note 2, 444 U.S. 85, 90, 62 L.Ed.2d 238, 245:

> "2. The warrant issued on March 1, 1976, did not itself authorize the search of Ybarra or of any other patron found on the premises of the Aurora Tap Tavern. It directed the police to search 'the following person or place ...the Aurora Tap Tavern...Also the person of "Greg".... 'Had the issuing judge intended that the warrant would or could authorize a search of every person found within the tavern, he would hardly have specifically authorized the search of Greg alone. Greg was an employee of the tavern, and the complaint upon which the search warrant

> was issued gave every indication that he would be present at the tavern on March 1."

Given the facts of Ybarra, it is difficult to see how that case can be described as even relevant to the issue of whether a magistrate in issuing a warrant for a place not open to the public may direct the search of the persons present. Yet the Alabama appellate courts describe Ybarra as "...the leading case on this issue...." (Brooks v. State 593 So.2d 97, 99 [Ala.Cr.App, 1991] appendix "B", page 8, quoting Helms v. State, 549 So.2d 598, 600 [Ala. Cr. Ap, 1989]; cert. den; U.S. cert. den. 493 U.S. 1022, 107 L.Ed.2d 744, 110 S.Ct. 725 [1990]). In fact, this Honorable Court has never addressed this issue.

In Ybarra, (note 4, 444 U.S. 85, 92, 662 L.Ed.2d 238, 246), this Court wrote, in pertinent part, as follows:

> "...[W]e need not consider situations where the warrant

> itself authorizes the search of unnamed persons in a place and is supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of illegal drugs...."

This case presents the very question which this Court did not decide in Ybarra.

The importance of this question is clear. Criminal enterprises are in operation throughout the country. Search warrants for the locations of these operations ae being executed everyday. In only the rarest of cases is it possible to identify all of the principals, associates, suppliers and customers of these clandestine activities, who will be present when warrants are executed. If magistrates cannot in appropriate cases order the search of these unidentified people, the executing officers must either eschew searching them or, more likely, find a pretext for a warrantless search of their persons. The fact that so many state

appellate courts have been called on to address this issue, as we set out in the next section, attests to the importance of this question.

This Court had no need to address this issue in Ybarra and has not done so in any subsequent case. For this reason we submit that the writ should issue to review this case.

B.

REASON FOR GRANTING THE WRIT: CONFLICT AMONG THE STATE APPELLATE COURTS

Prior to Ybarra a number of state appellate courts upheld warrants ordering searches of persons present, where such persons could not otherwise be identified and probable cause existed as to anyone present. State v. De Simone 60 N.J. 319, 288 A2d 849 (1972)[3]; Commonwealth v.

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3. Authorities from Florida, Georgia, Illinois, New York and Texas collected at 288 A2d 849, 854.

Smith 370 Mass. 335, 348 N.E.2d 101 (1976); cert. den. 429 U.S. 944, 50 L.Ed.2d 314, 97 S.Ct. 364. Subsequent to Ybarra, New Jersey (State v. In The Interest Of L.Q. 236 N.J. Super 464, 566 A2d 223 [1989]; cert. den. 122 N.J. 121, 584 A.2d 199) and Massachusetts (Commonwealth v. Fernandez 30 Mass. App. Ct. 335, 568 N.E. 2d 604, 607 ff [1991]), have continued to recognize the authority of magistratesto issue warrants for the search of persons present in appropriate cases. Significantly, the New Jersey Court discussed Ybarra in L.Q. (566 A2d 223, 225). In addition, since Ybarra, Colorado, (People v. Johnson) 805 P2d 1156, 1158 ff [Colo. App, 1990]; cert. den.); Florida (Terhune v. State 470 So.2d 840 [Fla. App, 2 Dist, 1985]); Minnesota (State v. Hinkel 365 N.E. 2d 774 [Minn, 1985]); Oregon (State v. Ingram 104 Or. App. 389,

802 P2d 656 [1990];[4] review granted 311 Or. 222, 810 P2d 854[5]), and Wisconsin (State v. Jeter 160 Wis. 2d 333, 466 N.W. 2d 211, 214 [Wis. App, 1991]) have approved warrants for persons present. In Johnson, (805 P2d 1156, 1158-1159), Hinkel (365 N.W. 2d 774, 776) and Jeter (466 N.W. 2d 211, 213ff) the Courts expressly rejected contrary arguments based on Ybarra.

In this case the Alabama appellate courts ruled that Ybarra established a per se rule forbidding the issuance of warrants for the search of unidentified persons who

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4. "...We do not believe that the legislature or the framers of the Constitution intended to prohibit searches of individuals for whom probable cause to search exists, but who, because of the circumstances, could not be described by name or personalized descriptions...." (802 P2d 656, 663)

5. We are advised that Ingram was argued in the Supreme Court of Oregon in January of this year and no decision is expected soon.

are present at a criminal enterprise. Obviously, such holding cannot be squared with the understanding of the Fourth Amendment and Ybarra of the appellate courts of Colorado, Florida, Massachusetts, Minnesota, New Jersey, Oregon or Wisconsin. For this reason, the writ should issue.

C.

REASON FOR GRANTING THE WRIT: CONFLICT WITH CONSTITUTIONAL POLICY AS RECOGNIZED BY THIS HONORABLE COURT

While this Court has never addressed the particular issue raised by this case, it has recognized and often discussed the Fourth Amendment's strong preference for searches under warrants. The rule established by the Alabama appellate courts in this case cannot be reconciled with that policy.

It would take extreme naiveté to believe that the rule adopted by the Alabama appellate courts will protect

unidentified persons, who are present at a searched criminal operation, from being searched. Situations such as that which greeted these officers at the Fish Supreme are extremely dangerous. Cocaine abuse produces highly unpredictable, often violent, behavior. Firearms are common at drug operations. The need to search both for weapons and for concealed contraband is obvious.

The Alabama appellate courts recognize that the search of persons who are present at a place for which a search warrant is issued is often necessary and appropriate. E.g. State v. Matthews __ So.2d___, 1992 W.L. 71056, (Ala. Cr. App, February 28, 1992); Stanfield v. State 529 So.2d 1053, 1056 (Ala. Cr. App, 1988); cert. den; Hastings v. State 439 So.2d 204, 205 ff (Ala. Cr. App, 1983); Travis v. State 381 So.2d 97, 101 (Ala. Cr. App, 1980); cert. den. 381 So.2d 102; Denson v.

State 375 So.2d 1275 (Ala.Cr.App, 1979); cert. den. 375 So.2d 1276.[6] Thus, it is not the law of Alabama that unidentifiable persons present at a criminal operation, which is searched under a warrant, cannot be searched, but it is the policy of the Alabama appellate courts that such persons may not be searched under a warrant. Because such persons are unidentifiable and cannot be named or described in the warrant, they are, according to the Alabama appellate courts, beyond the warrant process.

In placing unidentifiable persons who are present at a criminal operation beyond the protection of the warrant

---

6 In the Courts below, the Petitioner State argued, in the alternative to the validity of the warrant, that, even if the warrant was void as to the Respondent, the search of his person was lawful under this line of authority. The State courts declined to address this argument.

process, the Alabama appellate courts ruled contrary to the policy of the Fourth Amendment, which favors searches under warrants. This policy has been recognized by this Honorable Court many times. For example, McDonald v. United States 335 U.S. 451, 455-456, 93 L.Ed. 153, 158, 69 S.Ct. 191 (1948); United States v. Ventresca 380 U.S. 102, 105-106, 13 L.Ed.2d 684, 687, 85 S.Ct. 741 (1965); Illinois v. Gates 462 U.S. 213, 236, 76 L.Ed.2d 527, 546-547, 103 S.Ct. 2317 (1983); Massachusetts v. Upton 466 U.S. 727, 733, 80 L.Ed.2d 721, 727, 104 S.Ct. 2085 (1984). There are many reasons for this preference, including, as this Court wrote in Gates, above:

> "...[T]he possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his

> power to search...." (462 U.S. 213, 236, 76 L. Ed. 2d. 527, 547)

Obviously, any state policy which places persons beyond the protection of the warrant process is in irreconcilable conflict with the Fourth Amendment. In United States v. Ventresca, above, (380 U.S. 102, 108, 13 L.Ed.2d 684, 689), and Illinois v. Gates, above, (462 U.S. 213, 236, 76 L.Ed.2d 527, 547), this Court condemned giving warrant affidavits hypertechnical readings, because such might discourage officers from resorting to the warrant process. The policy established by the Alabama appellate courts recognizes no warrant process for unidentifiable persons, who are present at places ordered searched, to which an officer may resort. Such a policy should likewise be condemned.

CONCLUSION

In conclusion your Petitioner, the State of Alabama, respectfully submits that in this case the Court of Criminal Appeals and Supreme Court of Alabama, decided an important novel question under the Fourth Amendment in a manner which conflicts sharply with the decisions of other state appellate Courts. In addition, the policies established and followed by the Alabama appellate courts are contrary to the policies established by the Fourth Amendment and recognized by this Court.

Therefore, Your Petitioner prays that this Honorable Court will issue a writ of certiorari and will review the matters complained of and reverse the decisions of

the said appellate courts of Alabama.

Respectfully submitted,

JAMES H. EVANS
ATTORNEY GENERAL
BY:

_____
JOSEPH G.L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR THE
PETITIONER

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, hereby certify that on this _____ day of May, 1992, I did serve the requisite number of copies of the foregoing on the Attorney for Sylvester Brooks, Respondent, by mailing the same to said Attorney first class postage prepaid and addressed as follows:

Honorable Michael D. Cook
Attorney at Law
360 Fob James Drive
Valley, Alabama 36854

_____
JOSEPH G.L. MARSTON, III
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

0438H

91-1781

Supreme Court, U.S.
FILED
MAY 7 1992
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

SYLVESTER BROOKS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT
OF CRIMINAL APPEALS OF ALABAMA

APPENDIX TO THE PETITION

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III*
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

*Counsel of Record

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APPENDIX A

ORDER AND FINDINGS OF THE CIRCUIT COURT OF LEE COUNTY, ALABAMA

(R. pp. 267-268)

THE COURT: Okay. The Fourth Amendment to the Constitution provides as follows: The right to the people to secure in their person, houses, papers, and effects against unreasonable searches and seizures shall not be violated and no warrant shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched, the persons and things to be seized.

And then Section 6, Article 1 of the Alabama Constitution provides that the people shall be secure in their person, houses, papers, and possessions from unreasonable seizures and searches and that no warrant shall issue to search any place or to seize any person or thing without

probable cause supported by oath or affirmation.

Okay, the Court finds that the search in this case was not unreasonable. neither were the seizures. That the warrant in this case was issued on probable cause, that it was supported by oath or affirmation, and it particularly described the place to be searched and the persons or things to be seized.

And, therefore, the order and judgment of the Court that the warrant in this case, that is the search warrant, is proper, and I so find.

I also find that the search itself and the matters seized were done pursuant to law and in accordance with the Constitution of the State of Alabama and of the Federal Constitution.

Accordingly, your motions, each of the defendant's motions to suppress is denied. The results of the search, the Court finds, are admissible.

APPENDIX B

[RELEASED: July 26, 1991]

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1990-91

CR-90-169

Sylvester Brooks

v.

State

Appeal from Lee Circuit Court

(CC-89-017)

PATTERSON, PRESIDING JUDGE

The appellant, Sylvester Brooks, was convicted, after a jury trial, of trafficking in cocaine in violation of §13A-12-231, Code of Alabama 1975. He was sentenced to life imprisonment and was fined $50,000. The appellant raises several issues on appeal; however, we need only address whether the trial court erred by denying his motion to suppress the cocaine seized from his person.

Detective Melvin Harrison of the Opelika Police Department conducted an investigation of possible cocaine sales at John & Bo's Fish Supreme [hereinafter "restaurant"] in Opelika, Alabama. Harrison set up a "controlled buy" in which a confidential informant purchased from Michael Perry[1] a substance (later determined to be cocaine) through one of the restaurant take-out windows. The informant was "wired" with a transmitter, and Harrison observed the transaction take place. Harrison also observed another alleged cocaine sale, although not a controlled buy, by Perry at the take-out window. Harrison also discovered that the restaurant's license and utilities were in the name of Michael Perry. Based on his

---

[1] Michael Perry's conviction for trafficking in cocaine was affirmed by an unpublished memorandum. Perry v. State. [Ms. 89-813, April 26, 1991]____So.2d ___ (Ala.Cr.App. 1991).

observations and information, Harrison sought a search warrant.

The affidavit relating to the warrant authorizing the search of the restaurant states, in pertinent part, the following:

> "And ... the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows: a confidential informant in the past forty-eight hours has purchased cocaine from a black male known as Mike Perry at JOHN & BO's FISH SUPREME, 600 South Fourth Street in Opelika, Alabama. The money used in the purchase was copied and the serial numbers recorded. The purchase was also monitored and observed by Det. Harrison. The confidential informant used has been proved to be reliable and in the past has aided in the arrest of several persons. JOHN & BO's FISH SUPREME business license is also under the name of Michael Perry. Det. Harrison checked with the Opelika Light and Power and found that the power at JOHN AND BO's FISH SUPREME is issued to Michael Perry."

The search warrant states, in pertinent part:

"To any Sheriff, Deputy and/or Municipal Police:

"Proof by affidavit having been made this day before me, by Detective Melvin Harrison of the Opelika Police Department.

"You are hereby commanded to make immediate search on the person and premises of Michael Perry, alias, and the business at 600 South Fourth Street, Opelika, Alabama, known as JOHN AND BO's FISH SUPREME, and any other persons therein, and any vehicles on the premise.

"for the following property[:]cocaine hydrochloride or any other controlled substance and United States Currency."

The issue is whether the Opelika police had a constitutionally permissible reason to search the person of Sylvester Brooks. The search warrant provided for the search of Michael Perry, the restaurant, "any other persons therein," and any vehicles. The language "any other persons therein" is not within the dictates of §15-5-3, Code of Alabama 1975, which states: "A search warrant can only be

issued on probable cause, supported by an affidavit naming or describing the person and particularly describing the property and the place to be searched." (Emphasis added.) "As this court has held, general statutes regarding the issuance and execution of search warrants are to be strictly construed." Helms v. State 549 So.2d 598, 600 (Ala.Cr.App. 1989), cert. denied.___U.S.___, 110 S.Ct. 725 (1990). The phrase "any other persons therein" does not identify the person to be searched with reasonable certainty, nor does it particularly describe the appellant. This lack of identity and description "causes the warrant to be fatally defective [as to the search of the appellant] because there was no information to support the probable conclusion that 'anyone in the described place ... [would be] involved the criminal activity in such a way as to have evidence thereof on his person,'" Clark v. State.

527 So.2d 161, 163 (Ala.Cr.App. 1987) (quoting W. LaFave, 2 Search and Seizure §4.5(e) (2d ed. 1987). This rule is especially applicable to cases, such as the present one, in which the officer acknowledged at the suppression hearing that, when obtaining the warrant, he had no knowledge that anyone else was expected to be in the restaurant and that he did not know that the appellant would be present or that the appellant would possess cocaine, any other controlled substances, or United States currency.

Furthermore, this court has recognized the following:

> "[T]he leading case on this issue is Ybarra v. Illinois. 444 U.S. 85, ... (1979). In Ybarra. the United States Supreme Court held that the Fourth and Fourteenth Amendments will not be construed to permit evidence searches of persons who, at the commencement of the search, are on 'compact' premises subject to a search warrant, but are not named or described in the

warrant, even where the police have a 'reasonable belief' that such persons 'are connected with' drug trafficking and 'may be concealing or carrying away the contraband.' 444 U.S. at 94 ... This court, as well as all other courts in this land, is obliged to follow this decision.

"Alabama courts, in following the dictates of Ybarra. have held that a warrant to search designated premises will not authorize the search of every individual who happens to be on the premises. Travis v. State. 381 So.2d 97, 101 (Ala.Cr.App. 1979). cert. denied. 381 So.2d 102 (Ala. 1980). Neither does the fact that law enforcement officials have a warrant to search the house of an accused's girl friend authorize a search of the accused simply because of his presence at the place being searched. Denson v. State. 375 So.2d 1275, 1276 (Ala.Cr.App.), cert. denied. 375 So.2d 1276 (Ala. 1979). Furthermore, a search warrant authorizing the search of 'each and every person present in or near said mobile home' for drugs has been held 'too broad' to pass constitutional muster. Peavy v. State. 336 So.2d 199, 202 (Ala.Cr.App.). cert. denied. 336 So.2d 202 (Ala. 1976). See also Clenney v. State. 281 Ala. 9, 198 So.2d 293 (1966); C.D. Hau#er Co. v.

> Abramson. 215 Ala. 174, 100 So. 152 (1926); C. Gamble, McElroy's Alabama Evidence 334.01(2)(f) (3d ed. 1977)."

Helms. 549 So.2d at 600-01. See also Smith v. State. 292 Ala. 120, 289 So.2d 816 (1974); Bragg v. State. 536 So.2d 965 (Ala.Cr.App. 1988); Thomas v. State. 353 So.2d 54 (Ala.Cr.App.). cert. denied 353 So.2d 59 (Ala. 1977). Accordingly, we conclude that the search of the appellant was not proper based on the warrant.

Because the search of the appellant's person was not justified under the search warrant, the cocaine is due to be suppressed unless the search falls within one of the exceptions to the warrant requirement. "These exceptions are: (1) plain view, (2) consent, (3) incident to lawful arrest, (4) hot pursuit or emergency situations, (5) exigent circumstances coupled with probable cause, and (6) stop and frisk situations." Helms. 549 So.2d at 601. The state, however, asserts no

exception; thus, we do not consider any.

The state does argue, however, that even if the warrant was not properly issued for all persons present, the officers conducted the search of the appellant in good faith reliance on the warrant. However, we reject this argument. We note that the state has failed to cite any authority that has applied the good faith exception to a case of similar facts and circumstances.

> "The good faith exception does not extend to cases where the police have no reasonable grounds for believing that the warrant was properly issued. The Court has identified four situations in which police reliance on a warrant is not objectively reasonable: (1) when the magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit, (2) when the magistrate abandoned her judicial role and failed to act in a neutral and detached manner, (3) when the warrant was based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence

> entirely unreasonable,' and (4) when the warrant was so facially deficient that an officer could not reasonably have believed it to be valid."

Special Project, Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1989-1990. 79 Geo. L.J. 591, 732-35 (1991) (notes omitted). Both the third and fourth points above are applicable in this case.

First, the warrant, as it applied to "any other persons therein," was based on an affidavit "so lacking in indicia of probable cause" as to anyone other than Michael Perry "as to render official belief in its existence unreasonable." The affidavit simply did not provide probable cause to search any person other than Michael Perry.

Second, the warrant was "so facially deficient" as applied to "any other persons therein," "that an officer could not reasonably have believed it to be valid."

Id. A law enforcement officer should reasonably be aware of the well-settled principle of law that mere presence of unnamed and undescribed persons, where an otherwise valid warrant is executed, does not allow a search of those persons when probable cause does not exist. See Smith v. State; Helms v. State; Bragg v. State; Thomas v. State.

Based on the foregoing, the judgment of the circuit court is reversed and remanded.

REVERSED AND REMANDED.

ALL JUDGES CONCUR.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
JUDICIAL BUILDING, 445 DEXTER AVENUE
MONTGOMERY 36130

JOHN PATTERSON
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
SAM TAYLOR
H. WARD McMILLAN
Judges

Clerk's Office
(205) 242-4590

Court of Criminal Appeals No. 90-169
(Lee Circuit Court No. 89-017)

Sylvester Brooks vs. State ofAlabama
Appellant Appellee

Dear Sir or Madam:

You are hereby notifed that on September 20, 1991, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing overruled. Rule 39(k) motion denied. No opinion.

LANE W. MANN
CLERK
COURT OF CRIMINAL
APPEALS

lwm:kl

Hon. Michael D. Cook
360 Fob James Drive
Valley, AL 36854

APPENDIX C

THE STATE OF ALABAMA----JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
February 7, 1991

1910003

Ex parte State of Alabama
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Sylvester Brooks v. State)

(CCA 90-169 (Lee CC-89-017)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

KENNEDY, J. - Hornsby, CJ., Almon,, Shores, Adams, Houston, and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said court. Witness my hand this 7th day of Feb 1992

/s/Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX D

RELEVANT ALABAMA STATUTES

Code of Alabama , 1975:

TITLE 13A:

§13A-12-231. TRAFFICKING IN CANNABIS, COCAINE, ETC.; MANDATORY MINIMUM TERMS OF IMPRISONMENT; TRAFFICKING IN ILLEGAL DRUGS; HABITUAL FELONY OFFENDER ACT.

Except as authorized in chapter 2, Title 20: ...

(2) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine or of any mixture containing cocaine, described in section 20-2-25(1), is guilty of a felony, which felony shall be known as "trafficking in cocaine." If the quantity involved: ...

a. Is 28 grams, but less than 500

grams, then such person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years and to pay a fine of $50,000.00....

TITLE 15:

§15-5-1. "SEARCH WARRANT DEFINED."

A "search warrant" is an order in writing in the name of the state signed by a judge, or by a magistrate authorized by law to issue search warrants, and directed to the sheriff or to any constable of the county, commanding him to search for personal property and bring it before the court issuing the warrant.

§15-5-2. GROUNDS FOR ISSUANCE.

A search warrant may be issued on any one of the following grounds:

(1) Where the property was stolen or embezzled;

(2) Where it was used as the means of committing a felony; or

(3) Where it is in the possession of

any person with the intent to use it as a means of committing a public offense or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its discovery.

§15-5-3 PROBABLE CAUSE AND AFFIDAVIT REQUIRED.

A search warrant can only be issued on probable cause, supported by an affidavit naming or describing the person and particularly describing the property and the place to be searched.

§15-5-4. EXAMINATION OF COMPLAINANT AND WITNESSES; CONTENTS OF DEPOSITIONS.

Before issuing a search warrant, a judge, or magistrate authorized by law to issue search warrants, must examine on oath the complainant and any witness he may produce, take their depositions in writing and cause them to be subscribed by the persons making them. Such depositions must

set forth facts tending to establish the grounds of the application or probable cause for believing that they exist.

§15-5-5. ISSUANCE OF WARRANT.

If the judge or the magistrate is satisfied of the existence of the grounds of the application or that there is probable ground to believe their existence he must issue a search warrant signed by him and directed to the sheriff or to any constable of the county, commanding him forthwith to search the person or place named for the property specified and to bring it before the court issuing the warrant.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, hereby certify that on this _____ day of May, 1992, I did serve the requisite number of copies of the foregoing on the Attorney for Sylvester Brooks, Respondent, by mailing the same to said Attorney first class postage prepaid and addressed as follows:

Honorable Michael D. Cook
Attorney at Law
360 Fob James Drive
Valley, Alabama 36854

JOSEPH G.L.MARSTON, III
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

0439H

Supreme Court, U.S.
FILED
MAY 15 1992
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(3)

NO. 91-1781

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

SYLVESTER BROOKS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT
OF CRIMINAL APPEALS OF ALABAMA

SUPPLEMENT TO THE PETITION OF THE STATE OF ALABAMA

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III*
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

*Counsel of Record

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NO. 91-1781

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

SYLVESTER BROOKS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

SUPPLEMENT TO THE
PETITION OF THE STATE OF ALABAMA

SUMMARY OF THE SUPPLEMENTAL ARGUMENT

Four days after the mailing of the petition, the Petitioner learned that State v Ingram, (104 Or. App. 389, 802 P.2d 656 [1990], review granted 311 Or. 222, 810 P.2d 854), cited in the petition, has been reversed by the Oregon Supreme Court. State v Ingram, 313 Or. 139, ___ P.2d ___ 1992 W.L. 82118 (Or) (1992) In

reaching its conclusion that a "persons present" search warrant violated Oregon Statutes, the Oregon Supreme Court relied on its understanding that such warrants are void under the Fourth Amendment. Therefore, the Oregon Supreme Court, like the Alabama Appellate Courts but contrary to the holdings of the appellate courts of many other states, holds that "persons present" search warrants violate the Fourth Amendment.

SUPPLEMENTAL ARGUMENT

In its petition, which was mailed to this Honorable Court on May 1, 1992, the State of Alabama lists Oregon as one of the states whose appellate courts have held that the Fourth Amendment does not prohibit warrants for the search of persons who can be described only by their presence at a particular place. See petition , pages 19 and 27-28. The basis of our statement relative to Oregon was

State v Ingram (104 Or. App. 389, 802 P. 2d 656 [1990], review granted 311 Or. 222, 810 P.2d 854). Although we noted that review had been granted, we stated on advice, that no decision was expected soon from the Oregon Supreme Court. See petition, note 5, page 28.

On May 5, 1992, we learned that on April 23, 1992, the Oregon Supreme Court issued an opinion reversing the decision of the Oregon Court of Appeals. State v. Ingram, 313 Or. 139, ___ P. 2d ___, 1992 W.L. 82118 (Or) (1992).

Although the Oregon Supreme Court asserted that its decision was based on Oregon statutory law,[1] the Court interpreted the relevant Oregon statute to be, ". . at least as restrictive as the constitutional prohibition against

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1. ". . We reverse on the basis of defendant's statutory argument and , accordingly do not reach his constitutional claim. . . ." (1992 W.L. 82118, pages 1-2)

general search warrants . . . ." (1992 W.L. 82118, page 5). Then relying on the Fourth Amendment to the United States Constitution (quoted in full in footnote 5, ibid) and cases interpreting the Fourth Amendment , the Oregon Supreme Court held that a warrant ordering the search of persons described only as present at a place is constitutionally void.

Thus, the Oregon Supreme Court, like the Alabama Appellate Courts, has ruled that the Fourth Amendment forbids "persons present warrants". This holding is in sharp conflict with the rulings of other state appellate courts. See pages 26-29 of the petition.

CONCLUSION

It is apparent that there is a very sharp split of authority among the various states on the important issues raised by the petition. For this reason, the writ should issue.

Respectfully submitted,

JAMES H. EVANS
ATTORNEY GENERAL
BY:

_____
JOSEPH G.L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR THE PETITIONER

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, hereby certify that on this _____ day of May, 1992, I did serve the requisite number of copies of the foregoing on the Attorney for Sylvester Brooks, Respondent, by mailing the same to said Attorney first class postage prepaid and addressed as follows:

Honorable Michael D. Cook
Attorney at Law
360 Fob James Drive
Valley, Alabama 36854

_____
JOSEPH G.L. MARSTON, III
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

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Supreme Court, U.S.
FILED
JUL 6 1992
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No. 91-1781

In The

Supreme Court of the United States

October Term, 1991

STATE OF ALABAMA,

Petitioner,

vs.

SYLVESTER BROOKS,

Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

SYLVESTER BROOKS
Respondent Pro Se
P.O. Box 608
Valley, Alabama 36854

QUESTION PRESENTED

1. May a warrant magistrate validly issue a search warrant for unnamed persons when the affidavit and facts presented do not support a finding of probable cause?

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No. 91-1781

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STATE OF ALABAMA,

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Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved and at issue in this case are Sections 15-5-1 through 15-5-5, Code of Alabama (1975). Copies of these statutes are contained in the petitioner's appendix as Appendix D.

STATEMENT OF THE CASE

In this case the Court of Criminal Appeals ruled that the search of the respondent was not proper based on the search warrant. The affidavit upon which the search warrant was issued simply did not provide probable cause to search any person other than Michael Perry who was named in the affidavit and the search warrant. In reaching that conclusion the Court of Criminal Appeals quoted from the case of *Helms v. State*, 549 So. 2d 598 (Ala. Cr. App. 1989). in *Helms*, the court was faced with an affidavit which did not supply probable cause for the issuance of a search warrant authorizing the search of the person of Helms. Also, the search did not follow within the exceptions to the warrant requirement. *Helms v. State*, 549 So. 2d 598, 600.

In the present case, the Court of Criminal Appeals relied on Section 15-5-3, Code of Alabama (1975), which states:

> A search warrant can only be issued on probable cause, supported by an affidavit naming or describing the person and particularly descibing the property and the place to be searched.

The opinion of the Court of Criminal Appeals stated:

> [M]ere presence of unnamed and undescribed persons, where an otherwise valid search warrant is executed, does not allow a search of those persons when probable cause does not exist.

STATEMENT OF FACTS

On October 7, 1989, Melvin Harrison, a detective with the City of Opelika, applied to District Court Judge Richard Lane for a

search warrant. He presented Judge Lane with a packet of pretyped documents which included a diagram, a search warrant and an affidavit in support of the search warrant (R116). The search warrant affidavit read:

> In Lee County, State of Alabama, there is now being concealed certain property, namely cocaine hydrocholoride, a Schedule II drug under the Alabama Uniform Controlled Substances Act, and United States currency which are now being stored, concealed, otherwise hidden 600 South 4th Street, Opelika, Alabama, presently known as JOHN & BO'S FISH SUPREME.
>
> (Here give alleged grounds for search and seizure)

And the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows: "a confidential informant in the past 48 hours has purchased cocaine from a black male known as Mike Perry at JOHN & BO'S FISH SUPREME, 600 South 4th Street, Opelika, Alabama. The money used in the purchase was copied and the serial numbers recorded. The purchase was also monitored and observed by Det. Harrison. The confidential informant used has been proven to be reliable and in the past has aided in the arrest of several persons. JOHN & BO'S FISH SUPREME business license is also under the name of Michael Perry. Det. Harrison checked with Opelika Light and Power and foundthat the power at JOHN & BO'S FISH SUPREME is issued to Michael Perry . . . " (R644). The only other information supplied the judge by Det. Harrison was, "I told him while my confidential informant purchased cocaine, a vehicle drove up with two (2) black females and a black male. My informant was wearing a body mike, and when the two (2) black females and the black male stepped up to

the window, they asked Mr. Perry, also, for a quarter bags, which means cocaine." (R131).

Det. Harrison testified that he personally had typed the search warrant and the supporting affidavit before taking them and presenting them to the judge (R116).

After obtaining the judge's signature on the search warrant, Det. Harrison and other law enforcement officers went to John & Bo's Fish Supreme to execute the search warrant. They entered the premises with weapons drawn and ordered everyone down on the floor with their hands behind their backs (R216).

The three (3) persons inside were placed on the floor, their wallets removed from their pockets and each was handcuffed (R191, 232). Later, during the search, Det. Knight of the Opelika Police Department entered the premises and inquired whether or not the three (3) individuals on the floor had been searched (R279). No contraband had been discovered at that point in time (R192) but Det. Knight proceeded to search all three (3) persons even though he did not know the identity of either (R279). It was at that time that cocaine was alleged to have been found on respondent's person.

REASONS FOR DENYING THE WRIT

This case does not present a situation wherein the Court is faced with *an important novel question; a conflict with constitutional policy as recognized by the Honorable Court; or conflict among the state appellate courts.* This is simply a case where the search warrant affidavit did not provide probable cause to allow the magistrate to issue a search warrant for "any other persons therein." There was no information concerning an ongoing criminal enterprise but there was information that Michael Perry was operating John & Bo's Fish Supreme and that Michael Perry would likely be on the premises and have cocaine on his person. The

Alabama appellate courts made no determination that *Ybarra v. Illinois*, 444 U.S. 85, 62 L. Ed. 2d 238, 100 Sup. Ct. 338 (1979), established a per se rule barring the issuance of warrants to search persons who can be identified only by their presence at a "criminal operation." It only confirmed what this Court observed in *Ybarro*, 100 Sup. Ct. 338, 339:

> When the search warrant was issued the authorities had no probable cause to believe that any person found in the tavern, aside from the bartender would be violating the law.

The search warrant affidavit in the present case named Michael Perry and gave every indication that Mr. Perry had cocaine on his person but did not set forth any facts pertaining to anyone else on the premises. The issuing magistrate signed a search warrant which had been prepared for him by the law enforcement officer and which exceeded the scope of the affidavit which the officer also prepared and presented to the judge.

The State of Alabama in the Petition filed in this matter has developed its argument around the term "original enterprise." The affidavit in support of the search warrant in this case does not reveal even the hint of a criminal enterprise and actually provides only enough information to determine that one person is engaged in or has sold small quantities of cocaine. There was no indication that other people were involved in the sell or that all persons on the premises would likely be engaged in illegal activities. As the Court stated in *Ybarro*, 100 Sup. Ct. 338, 342:

> Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement can not be undercut or avoided by simply pointing to the

> fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

In the instant case, the officers initially seized the respondent, not merely detaining him, as they ordered him onto the floor, handcuffed him and removed his wallet. There was no probable cause to search and seize the respondent at that point in time and no contraband had been located. The Alabama appellate courts merely continued the "probable cause" requirement for search warrants and applied that requirement to the statutory requirement for issuance of search warrants in the State of Alabama. Section 15-5-3, Code of Alabama (1975), requires that:

> A search warrant can only be issued on probable cause, supported by affidavit naming or describing the person and particularly describing the property and the place to be searched.

Had the affidavit in question supplied probable cause for the search of other persons on the premises, the Alabama appellate courts would have upheld the seizure, the search and the subsequent seizure.

CONCLUSION

In conclusion, your respondent Sylvester Brooks respectfully submits that this case is not an appropriate one for the Court to review or for the Court to issue a writ of certiorari.

Respectfully submitted,

SYLVESTER BROOKS
Respondent Pro Se

(5)

Supreme Court, U.S.
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NO. 91-1781

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

SYLVESTER BROOKS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT
OF CRIMINAL APPEALS OF ALABAMA

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III*
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

*Counsel of Record

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91-1781

IN THE SUPREME COURT OF THE
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STATE OF ALABAMA,

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ON PETITION FOR A WRIT OF CERTIORARI
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COURT OF CRIMINAL APPEALS OF ALABAMA

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION

SUMMARY OF THE REPLY ARGUMENT

The Alabama Appellate Courts reversed the Respondent's conviction, not because of a lack of probable cause, but because of an allegedly insufficient description of the Respondent in the search warrant.

Given the practical importance of the question presented by the petition, the amount

of litigation the issue has and is generating, the sharp split among the states, and the important constitutional rights which are at risk in one or the other group of States, this issue is of extreme importance.

REPLY ARGUMENT

In this case the warrant magistrate found that probable cause existed as to "John and Bo's Fish Supreme, and any other persons therein" (Brooks v. State 593 So.2d 97, 98 [Ala.Cr.App, 1991]; cert. den; appendix to the petition, page 6) One of the "persons therein", Michael Perry, was identified at the time of the warrant and was named in the warrant. (Ibid.) The Court of Criminal Appeals approved the search of the Fish Supreme and of Michael Perry and so noted in the opinion in this case Brooks v. State, above, at 98; App. at 4. The only difference between Michael Perry and the Respondent is that Perry was identified and named in the warrant, while this Respondent was not known and not named. Perry's conviction was affirmed (Perry v. State 586 So.2d 307, 3rd case, [Ala.Cr.App, 1991]); this Respondents conviction was reversed. The reason for this, as stated in the opinion of the Court of

Criminal Appeals, is a presumed absolute bar by the Fourth Amendment on warrants for persons who can be identified only by their presence at the place ordered searched. Brooks v. State, above, at 593 So.2d 99, App. pp. 8-10. See also Helms v. State 549 So.2d 598, 601 (Ala.Cr.App, 1989); cert. den; U.S. cert. den. 493 U.S. 1022, 107 L.Ed.2d 744, 110 S.Ct. 725 (1990), quoted in Brooks v. State, above, at 593 So.2d 99; App. pp. 8-10. This is the issue decided by the Alabama Appellate Courts, and this is question presented by the petition.

The Respondent claims that the issue presented is whether there was probable cause for the search of the Respondents. Since the Alabama Courts upheld the search of Michael Perry, who was named in the warrant, it seems obvious that, if the Respondent's identify had been known and if he had been named in the warrant, the warrant would have been upheld as to him as well. What was missing according to

the Court of Criminal Appeals was an adequate description of the Respondent, not probable cause.

Base on his misapprehension of the issue, the Respondent says that the issue presented here is not important. However, the issue actually presented, as we set it out in the petition is important for at least four reasons:

1. It relates to a common situation which comes before the courts every day.

2. The question has generated and is continuing to generate large amounts of litigation, considering the numerous appellate opinions on the subject.

3. There is a sharp slit among the states on this issue.

4. If States like Alabama and Oregon (State v. Ingram 313 Or. 139, __ Psd __, 1992 W.L. 82118 [Or.] [1992]; supplement to the petition.) are correct, then the many states which allow persons present warrants are

regularly violating people's Fourth Amendment rights, by allowing searches under such warrants. If, however, Alabama and Oregon are wrong in holding that such warrants are void, then, in placing persons who cannot be identified at the time the warrant is issued beyond the protection of the warrant process, these states are in patent violation of the Fourth Amendment.

It is obvious that this is a question which must be resolved, and we submit that the instant case an excellent opportunity to examine the issue and resolve it.

CONCLUSION

In conclusion your Petitioner, the State of Alabama, again respectfully submits that in this case the Court of Criminal Appeals and Supreme Court of Alabama, decided an important novel question under the Fourth Amendment in a manner which conflicts sharply with the decisions of other state appellate courts on the same issue. In addition, the

policies established and followed by the Alabama appellate courts are contrary to the policies established by the Fourth Amendment as recognized by this Court.

Therefore, Your Petitioner again prays that this Honorable Court will issue a writ of certiorari and will review the matters complained of and reverse the decisions of the said appellate courts of Alabama.

Respectfully submitted,

JAMES H. EVANS
ATTORNEY GENERAL
BY:

_____
JOSEPH G.L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR THE
PETITIONER